APPENDIX I

Filed United States Court of Appeals Tenth Circuit, Mar. 24, 1970. William L. Whittaker, Clerk.

UNITED STATES COURT OF APPEALS TENTH CIRCUIT
JANUARY, 1970, TERM

No. 87-69

UNITED STATES OF AMERICA,
Plaintiff-Appellant.

vs.

WILSHIRE OIL COMPANY OF TEXAS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

(District Court No. K.C.—CR.-873)

W. Richard Haddad, Attorney, Dept. of Justice, Washington, D.C., (Richard W. McLaren, Assistant Attorney General, Howard E. Shapiro, Attorney, Dept. of Justice, Washington, D. C., John E. Sarbaugh and Raymond D. Hunter, Attorneys, Dept. of Justice, Chicago, Illinois, on the brief) for Appellee;

Robert J. Woolsey of Farmer, Woolsey, Flippo & Bailey, Tulsa, Oklahoma. (Harry W. Colmery of Colmery, Davis, Bennett, Leonard & McClure, Topeka, Kansas, on the brief) for Appellant.

Before LEWIS, HILL and SETH, United States Circuit Judges.

HILL, Circuit Judge.

On April 5, 1966, a federal grand jury for the District of Kansas indicted ten corporations[1] charging each with having violated 15 U.S.C. § 1. Specifically the indictment charged "the defendants and co-conspirators entered into and engaged in a combination and conspiracy in unreasonable restraint trade and commerce in liquid asphalt in violation of Section 1 of the . . . Sherman Act." All defendants except Wilshire plead non contendere and were subsequently fined from $25,000 to $40,000 each. Wilshire's case was tried to a jury and resulted in a guilty verdict and a fine of $25,000. Motions for judgment n.o.v., for judgment of acquittal, new trial and a motion to dismiss on double jeopardy grounds were all overruled, with the latter meriting a special hearing.[2] Wilshire has appealed.

A thumbnail sketch of the uncontroverted facts reflects that Wilshire is a Delaware corporation which, in late 1960, purchased Riffe Petroleum Company and operated it as an unincorporated division of Wilshire until August, 1963, when Riffe was sold. It was during that period of time that Wilshire admittedly sold liquid asphalt to the State of Kansas and allegedly participated in an

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1 The ten corporations indicted were: Wilshire Oil Company, Socony Mobil Oil Company, Skelly Oil Company, the Consumers Cooperative Association, American Petrofina Company of Texas, Union Asphalt and Roadoils, Colorado Oil and Gas Corporation, The American Oil Company (Standard of Indiana), Phillips Petroleum Company, and Apco Oil Corporation.

2 The defense of double jeopardy was first raised by Wilshire in a pretrial motion at which time both parties agreed, with the court's permission, to submit the matter in a post-trial evidentiary hearing if Wilshire were ultimately found guilty. After conviction, Wilshire renewed its attack upon the prosecution by reason of claimed double jeopardy, and a special hearing on the issue was held. The burden was, by agreement of the parties, upon Wilshire. At the conclusion of the hearing, Wilshire requested that the trial court enter its findings of fact and conclusions of law under Rule 23, F. R. Crim. P. 18 U.S.C.A., which the trial court correctly deemed inapplicable. Nonetheless, upon Wilshire's request the court recited its findings, framing them in terms of the Government's burden of establishing beyond a reasonable doubt that there was not a single multistate conspiracy.

illegal conspiracy to fix the price of such asphalt. The charged conspiracy operated in the following fashion. The state is divided into six highway districts. Yearly the state asphalt buyer determines the location or "points" in each district which will require asphalt during the ensuing year. Bid invitations are then mailed to all asphalt sellers in the area. Upon the enclosed blank bid is a list of all the asphalt-requiring "points" in the state. The sellers then list the per gallon price at which they are willing to deliver the asphalt to each point on which they wish to bid. The sealed bids are then opened publicly and contracts are awarded to the lowest bidder on each "point." The alleged bid rigging operated on an over-under system. During each year involved and prior to submitting their "point" bids, the alleged conspirators met to agree on freight rates to the various districts and "points" and to set a base per gallon price. Before the meeting was concluded each company was assigned certain "points" which it was to win in the bidding. Then, on the basis of the prearranged formula, each company bid under formula price on each "point" allocated to it and over the base cost, plus rates, on others not assigned to it. During the course of the conspiracy, from 1959-65, approximately 112,000,000 gallons of liquid asphalt valued at about $12,000,000 were sold and delivered by the named oil companies. Of the gross amount, about 2.6 million gallons were shipped in interstate commerce. Subsequent to the Wilshire-Riffe merger, it received contracts for ten to twelve million gallons per year, all of which were shipped intrastate.

On this statement of fact the appellant first argues that the indictment and evidence are insufficient since it is neither charged nor proved that Wilshire knowingly joined the conspiracy. We treat the indictment attack first. The fatal defect urged consists of a failure to allege that the conspiracy was formed and in existence; that Wil-

shire knew of its presence and knowingly agreed to join and commit acts in furtherance of its purposes. The single case cited as authority for this allegation[3] is inappropriate, and discussion of it will be deferred until a timely moment. To determine the sufficiency of an indictment the court views the entire document[4] to ascertain whether the offense is charged with sufficient clarity so as to safeguard two constitutional guarantees: the Sixth Amendment right to be informed of the nature and cause of the accusation in order to prepare a defense; and the Fifth Amendment protection against twice being placed in jeopardy for the identical offense.[5] The indictment adequately apprised Wilshire of its participation in the conspiracy and was not faulty for the reasons urged. The defendants and co-conspirators were charged with entering into and engaging in a continuing conspiracy from 1959 to 1965,[6] but the indictment specifically stated that Wilshire only participated from December 31, 1960, until August 9, 1963.[7]

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3 **Jones v. United States**, 251 F.2d 288 (10th Cir. 1958).

4 **Imperial Meat Co. v. United States**, 316 F.2d 435 (10th Cir. 1963); **Carlson v. United States**, 249 F.2d 85 (10th Cir. 1957); **United States v. Armour & Co.**, 137 F.2d 269 (10th Cir. 1943).

5 **United States v. Tijerina**, 407 F.2d 349 (10th Cir. 1969); **Nelson v. United States**, 406 F.2d 1136 (10th Cir. 1969); **Woodring v. United States**, 376 F.2d 824 (10th Cir. 1944); **United States v. Armour & Co.**, 137 F.2d 269 (10th Cir. 1943); 8 Moore's Federal Practice § 7.04 at 7-14 to 7-20. (10th Cir. 1943); 8 Moore5s Federal Practice § 7.04 at 7-14 to 720.

6. Paragraph 12 reads: "Beginning some time prior to 1959 and continuing thereafter through at least 1965, the exact dates being to the grand jurors unknown, the defendants and co-conspirators entered into and engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described interstate trade and commerce in liquid asphalt in violation of Section 1 of . . . the Sherman Act."

7 Paragraph 3 reads: "Wilshire Oil Company of Texas . . . a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Denver, Colorado, is hereby indicted and made a defendant herein. Riffle Petroleum Company, a corporation organized and existing under the laws of the State of Oklahoma, was purchased by and merged with Wilshire Oil on or about December 31, 1960. From about December 31, 1960 until August 9, 1963, Riffe Petroleum Company was operated by Wilshire Oil as an unincorporated division of Wilshire Oil. From about December 31, 1960 until August 9, 1963, Wilshire Oil, through its Riffe Petroleum Division, engaged in the business of distributing and selling liquid asphalt in the State of Kansas and in other States."

Rather than a devious attempt to conceal vital elements of a defect-free indictment, this was an adequate attempt to further vouchsafe Wilshire's constitutional rights. The record vividly reflects that appellant was made cognizant of the charge and facts constituting the breach of law;[8] was able to plead, prepare a defense and produce witnesses to meet the charge. The practical effect was that the protection to be afforded by the indictment was furnished.

The brunt of the sufficiency of evidence argument focuses on the propriety of attributing the previously obtained guilty knowledge of a Riffe Division agent, to Wilshire after the merger. At this juncture Jones v. United States, 251 F.2d 288, 293 (10th Cir. 1958) is material. In that opinion we said: "A person does not become liable as a conspirator unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance thereof. [citing cases]. This knowledge and participation may be inferred from the circumstances, acts and conduct of the parties." The agent caught in the cross-fire of this argument was first employed by Riffe in early 1960, to represent its asphalt interests in Kansas and Colorado. Riffe was the broker for asphalt produced at the Century Refining Company at Shallow Water, Kansas, and it was the agent's responsibility to procure contracts with the state and local governments of Kansas. The agent attended the 1960 meeting of asphalt salesmen when the "points" were divided up and was successful in getting only nine of them in a single western Kansas division. In 1961 he was a Wilshire

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8 Wilshire's pre-trial motion to dismiss is further evidence that it was well informed by the indictment of the charge lodged against the company. That motion implicitly acknowledges that they were charged with joining and participating in an on-going conspiracy, and read in part: that this defendant knew of the existence of the conspiracy, agreed to that this defendant knew of the existence of he conspiracy, agreed to become part of it, and with that knowledge committed some act in furtherance thereof, required in this case because of other allegations in the indictment."

agent when he attended the conspirator's meeting, and was then able to win forty-two western Kansas "points." Wilshire argues that the only knowledge it could have had regarding their participation in the conspiracy was knowledge acquired prior to the merger and they are thereby liable for neither the pre-merger crime nor their post-merger involvement. The first argument is wide of the mark since the prosecution of Wilshire extends only from late 1960 to August, 1963. The latter statement is novel in that it ignores facts and circumstances which permit the court and jury to imply ratification or acquiescence. We pause to note that the argument does not deny that an agent's knowledge is imputed to the corporation if gained while acting in the scope of employment. The proposition merely suggests that Wilshire is immune from prosecution here because of a fortuitous series of events which placed them at the scene after the acquisition of the agent's information.

There is no question about the continuing nature of the plat nor is there reasonable doubt that Wilshire was a part thereof. And we believe the ticklish problem of pre-merger knowledge must be decided against Wilshire on the facts. Although appellant claims to have unwittingly bought into an on-going conspiracy and for that reason it ought to be excused, the totality of the evidence supports the conclusion that Wilshire had ample opportunity to detect and reject the illegal practices. This is not a case where a company was purchased without chance for scrutinizing observation prior to assumption of control. The agreement of merger is dated September 23, 1960. This ought to have given appellant adequate time to become intimately familiar with the modus operandi of Riffe. And undisputed evidence was tendered by the Kansas salesman of Riffe Division from which it may be concluded that during the three year affiliation of Riffe with Wilshire, the vice-president in charge of the Riffe Division knew of and acquiesced in the continued conspiratorial

participation. Wilshire is unable to rid itself of liability because of its inability to personally supervise the acquired company and its subordinates particularly when they failed to object a single time during the three year association. Viewed in the light most favorable to the Government, the evidence tendered by the prosecution provided ample basis for a jury, properly instructed, to find the requisite knowledge and participation by Wilshire.

Appellant next contends that the indictment and evidence are insufficient by their failure to set out factual allegations and proof of a conspiracy in restraint of interstate trade. It has long been settled that "[a]greements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition." Ethyl Gasoline Corporation v. United States, 309 U. S. 436, 458 (1940). To sufficiently allege the interstate nature of the offense, the indictment need only charge that a combination was formed to fix prices on goods traveling interstate and that it had that effect or contributed to that end.[9] The indictment alleged that "[s]ubstantial quantities of liquid asphalt purchased by the State of Kansas and transported into Kansas in a continuous and uninterrupted flow of interstate commerce directly from the refinery of the American Oil Company which is located at Sugar Creek, Missouri, to job sites in Kansas." The purpose was "to fix, maintain, and establish noncompetitive prices for the sale of liquid asphalt to the state of Kansas." And the effect was that "prices of liquid asphalt to the State of Kansas have been fixed, maintained, and established at high, artificial, and non-competitive levels." Hence, the substance of the statutory offense is charged as are the facts supporting the offense and the indictment is sufficient.

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9 See **United States v. Socony-Vacuum Oil Co.**, 310 U.S. 150 (1940); **Revely Dairy Co. v. United States**, 178 F.2d 363 (8th Cir. 1949).

The evidence is not insufficient merely because Wilshire itself was not shown to have shipped into Kansas. The apposite inquiry is whether appellant was engaged in a plot which maintained prices on products, a part of which moved in interstate trade.[10] The evidence is undisputed that Standard Oil shipped asphalt into Kansas. It is not contested that Standard won numerous "points" in northeast Kansas as a result of the conspiracy nor is it denied that the interstate goods went to those "points." None of the agents deny that Standard was an active participant in the scheme, nor does the Standard salesman. Furthermore, contrary to Wilshire's argument, all oil company representatives agreed that there was one Kansas conspiracy which dealt with all the highway districts. A careful review of the testimony and exhibits reflects abundant evidence from which the jury could properly find the existence of one conspiracy which included Wilshire in western Kansas and Standard Oil in eastern Kansas.

The next point urged by Wilshire is that the court erred in overruling their motion for a new trial based on the jurors' reading of a newspaper headline. Near the close of the trial several prejudicial newspaper articles were called to the court's attention. Following the practice commenced in Mares v. United States, 383 F.2d 805 (10th Cir. 1967), each juror was separately examined by the court. The trial court determined that three jurors saw part of a headline but that each heeded the admonition of the court and desisted from reading the story. The readline read: "Attempt Made At Oil Accord—Kansas Highway Board Meets With Counsel for Firms—No Commitments Yet—Talks Explore Possibility of Antitrust Settlement." Although there is no mention of Wilshire in the headline, appellant argues that prejudicial conclusions are the nat-

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10 **United States v. Painters' Dist. Council No. 14**, etc., 44 F.2d 58 (N.D. Ill. 1930); **Boyle v. United States**, 40 F.2d 49 (7th Cir. 1930).

ural result of having viewed the caption. Ultimate reliance is placed on Mares v. United States, supra, and Marshall v. United States, 360 U.S. 310 (1959), which, as the trial court noted, do not govern the instant situation. In Mares the story and headlines reported prior confessions of the defendant for the very crime for which he was then being tried. In Marshall the newspaper exposed evidence which had previously been ruled inadmissible at trial. The instant headlines and story do not approach such prejudicial comment. The trial judge found no reason to infer prejudicial conclusions from the jurors' brief encounter and neither can we. Welch v. United States, 371 F.2d 287 (10th Cir. 1966). We find neither error nor abuse of discretion in the trial court's manner of handling the problematical issue.

On the proposition that Wilshire and others were convicted in a federal court for participation in an asphalt conspiracy in Missouri, it is contended that the prosecution here twice places Wilshire in jeopardy. Appellant's basic plea is that the government is attempting to splinter a single conspiracy into two parts, i.e., a Missouri conspiracy and a Kansas conspiracy, when in fact and law the two are but fragments of a single scheme. The indictments in Kansas and Missouri are in some respects identical, with the following relevant exceptions. (1) Different parties are named in each: there are eight corporations common to both; two were named in Kansas and not in Missouri; ten corporate and seventeen individual defendants were named in Missouri and not in Kansas. (2) There are overlapping but different dates of existence: in Missouri it was from 1960-63 and in Kansas from 1959-65. (3) The offenses charged vary: the Missouri indictment charged that the defendants and co-conspirators acted to "suppress and eliminate competition in the sale of liquid asphalt to the State of Missouri . . .": the Kansas indictment charged the co-conspirators and defendants with conspiring "to fix, maintain, and establish non-com-

petitive prices for the sale of liquid asphalt to the State of Kansas . . ." Although a single plot may not be severed into several in order to proliferate penalties, prosecution for one offense will not confer immunity from subsequent prosecutions of distinct, though related, offenses.[11] Thus the pertinent inquiry is whether the record presented by Wilshire is sufficient to establish that it and all other oil companies indicted in Missouri and Kansas had a single, common and continuing objective of fixing, maintaining and establishing prices to suppress and eliminate competition in the sale of liquid asphalt to Kansas and Missouri.[12] If so, there would be but one conspiracy even though its purposes were advanced in diverse parties. Contrariwise, if the Missouri defendants did not share such broad objectives with their Kansas counterparts, but were attempting only to fix prices within their respective states, there were multiple conspiracies with each pursuing its own distinct illegal end.

Because the resolution of the question depends on the facts of each case, we are hesitant to follow other decisions unless they are on all fours with this suit. Appellant urges that the Honda cases[13] and United States

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11 **Hattaway v. United States**, 399 F.2d 431 (5th Cir. 1968); **Nelms v. United States**, 291 F.2d 390 (4th Cir. 1961); **United States v. Cohen**, 197 F.2d 26 (3rd Cir. 1952); **Upshaw v. United States**, 157 F.2d 716 (10th Cir. 1946); **United States v. American Honda Motor Co.**, 273 F. Supp. 810 (N.D. Ill. 1967); **United States v. American Honda Motor Co.**, 271 F. Supp. 979 (N.D. Cal. 1967).

12 The burden of proving former jeopardy for the same offense by a preponderance of the evidence rests upon the movants. **Sanchez v. United States**, 341 F.2d 225 (9th Cir. 1965); **Rothaus v. United States**, 319 F.2d 528 (5th Cir. 1963); **Reid v. United States**, 177 F.2d 743 (5th Cir. 1949); **United States v. Potash**, 118 F.2d 54 (2nd Cir. 1941); **United States v. American Oil Co.**, 296 F. Supp. 538 (D. N. J. 1969); **United States v. Koontz Creamery, Inc.**, 257 F. Supp. 295 (D. Md. 1966).

13 **United States v. American Honda Motor Co.**, 289 F. Supp. 277 (S.D. Ohio 1968); **United States v. American Honda Motor Co.**, 273 F. Supp. 810 (N.D. Ill. 1967); **United States v. American Honda Motor Co.**, 271 F. Supp. 979 (N.D. Cal. 1967).

v. Koontz Creamery, Inc., 257 F. Supp. 295 (D. Md. 1966) are such cases. After careful examination of the facts in each, we are unable to concur with Wilshire's analogy. In each of these cases the courts were dealing with facts which do not coalesce with Wilshire's.

In Koontz, the defendants were milk distributors who had been earlier convicted for fixing prices on school milk in the Baltimore area. They were then indicted for fixing other wholesale and retail milk prices during the same period of time in the same area. The trial court granted their motion to dismiss on double jeopardy grounds on the following facts. The defendants in both cases were substantially identical; that met or were represented at meetings at the same principal place under the auspices of the Milk Distributors Association; the meetings were called and conducted the same whether the purpose was school bids, labor costs, the price of raw milk, jugs, jug pricing and deposits, or other matters of interest; at the meetings the subject matter usually covered numerous topics relating to the overall price control scheme. The court concluded: "The purpose of the defendants, conspiratorial or not, was to maintain market price stability in the Baltimore milk market. . . . and that actions with respect to school milk, street milk, and jug milk were actions designed to control certain aspects of distribution, all of which were facets of, or factors in, the overall price structure." United States v. Koontz Creamery, Inc., 257 F. Supp. at 305.

In the Honda cases, American Honda was first tried and convicted for fixing prices on Honda motorcycles in the Los Angeles area. Thereafter indictments were returned against them in northern California, northern Illinois and southern Ohio for identical offenses. In each of the latter cases Honda moved for dismissal on double jeopardy grounds, which were granted. The persuasive evidence in those cases was as follows: Honda dealers in each area are

concerned with the retail price structure in all other areas; price-cutting affects the ability of dealers to maintain proper servicing and advertising and in turn the product's reputation is injured; all dealers are concerned about discounting in one area because of the tendency of others to follow suit; the widespread price stability is a strong inducement to prospective dealers; and discounting in any area affects trade-in value as compiled for the trade Blue Book The courts said: "It is unrealistic to conclude that dealers in one region were wholly unconcerned with the maintenance of prices in other regions and concerned only with price maintenance by dealers in their own particular region.' United States v. American Honda Motor Company, 271 F. Supp. at 985 and United States v. American Honda Motor Co., 273 F. Supp. at 818.

Wilshire was given opportunity in an independent evidentiary hearing to develop facts to support its double jeopardy claim. But the testimony proffered then simply does not compare favorably to the above cases. Because the Missouri defendants plead nolo contendere, we have no testimony to examine and compare to that offered in the Kansas trial. We are thus compelled to rely exclusively upon the evidence tendered in the post-trial hearing on the double jeopardy claim. Wilshire's Kansas agent testified first. In highly synthesized form, he repeatedly affirmed that although he knew of the Missouri conspiracy and participated in the one in Kansas, he knew of no connecting link between the two. To his kowledge there was never any discussion relative to the Missouri bidding, during the course of the Kansas meetings; Wilshire never discussed with the competitors the restriction of Kansas bidding in anticipation of more Missouri contracts; and he knew of no attempt by any of the companies to take less in one state to gain in the other. Next the Missouri salesman of the Riffe Division of Wilshire volunteered that there was never any connection between their bids in

Missouri and Kansas. Finally a Skelly salesman reaffirmed that he knew of no Kansas meetings where the Missouri lettings were discussed nor any Missouri meetings where Kansas bids were talked about. He added that neither his company nor any of the others restricted their bids in one stated to secure additional "points" in another state. He concluded by answering that there was never any statement made to him that there was any connection between the bids in the two states. And on cross-examination he further elaborated that there was never a meeting where they talked about one state and then switched to the other. At the conclusion of the evidentiary hearing, the trial judge entered findings which, coupled with the testimony, refute any favorable comparison of this case to the Koontz or Honda cases.[14] In short, there is a general absence of testimonial evidence which supports appellant's double jeopardy claim. Our conclusion is but an echo of the trial judge's that the parties here were tried for a plot involving a distinctively separate conspiratorial purpose.

It is also urged that counsel for the Government was guilty of making inflammatory remarks sufficient to en-

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14 The trial judge found: ". . . that the government has established beyond a reasonable doubt that there was not one large conspiracy split into small ones . . . The sole subject of the Kansas conspiracy was to allocate points or by allocating points, fix the prices of liquid asphalt sold to the State of Kansas, and the purpose of the Missouri conspiracy was identical except that it had to do with the sale of liquid asphalt to the State of Missouri.

I find that the conspiracies charged . . . were completely different and unconnected although necessarily, as the evidence progressed, there was some reference back and forth to the dealings between the defendant here and the other defendants in the case and the State of Missouri.

I find that the proof of the matters charged in the Kansas indictment would not have been admissible had there been a trial on the Missouri indictment and that if admitted, it would not have sustained a conviction on the Missouri indictment."

title Wilshire to reversal. The remarks were improper[15] but even if they were prejudicial their impact was promptly removed by the trial court's instruction to the jury. The determination of the extent of permissible argument rests primarily in the discretion of the trial court. We do not agree that remarks made by counsel were of such gravity as to require reversal in view of the timely admonition of the lower court.[16]

The trial court imposed a fine of $25,000 on Wilshire. The maximum fine allowed by 15 U.S.C.A. § 1 is $50,000. Appellant says the fine was excessive. We have often held that when the punishment is within the statutory limit, this court will not interfere with the trial court's exercise of discretion in fixing the punishment absent unusual circumstances,[17] none of which are present here.

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15 The lawyer said: "Mr. Woolsey (defendant's attorney) has attempted . . . to confuse the issue, throw sand in your eyes . . ."

16 **Bailey v. United States**, 410 F.2d 1209 (1969); **Aiuppa v. United States**, 393 F.2d 597 (10th Cir. 1968), vacated on other grounds, **Giordono v. United States**, 394 U.S. 310 (1969).

17 See **Weissman v. United States**, 387 F.2d 271 (10th Cir. 1967); **Welch v. United States**, 371 F.2d 287 (10th Cir. 1966); **Martin v. United States**, 364 F. 2d 894 (10th Cir. 1966).

APPENDIX II

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. KC-CR-873

UNITED STATES OF AMERICA

v.

WILSHIRE OIL COMPANY OF TEXAS

On this 25th day of October, 1968, came the attorney for the government and the defendant appeared[1] by counsel Robert J. Woolsey and Harry W. Colmery at Kansas City, Kansas.

IT IS ADJUDGED that the defendant has been convicted upon its plea of not guilty entered June 2, 1966, and after trial by jury beginning some time prior to 1959 and continuing thereafter through at least 1963, with others, entered into and engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in liquid asphalt, in violation of the Sherman Act, 15 USC 1, as charged[2] in Indictment of one count,

IT Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant shall pay a fine in the sum of $25,000.00 and remaining costs of the action.

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1 Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

2 Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty and the finding of guilty," or (4) "nolo contendere," as the case may be.

3 Insert "in count(s) number " if required.

It Is Adjudged that[5] execution of said judgment is hereby stayed ending appeal.

Filed Oct. 29 1968. Charles W. Cahill, Clerk.

(Seal)

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

ATTEST: A true copy

Charles W. Cahill, Clerk.

By Eugenia Rudy, Deputy. 1/22/69

It Is Ordered that the Clerk deliver a certified copy of this Judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

APPROVED: Arthur J. Stanley, Jr. Chief United States District Judge.

Benjamin E. Franklin
United States Attorney

The Court recommends commitment to:[6]

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5 Enter any order with respect to suspension and probation.
6 For use of Court wishing to recommend a particular institution.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. KC-CR-873

Filed March 29, 1968. Charles W. Cahill, Clerk. By Eugenia Rudy, Deputy.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILSHIRE OIL COMPANY OF TEXAS, Defendant.

MEMORANDUM AND ORDER

The defendant was convicted by a jury of violation of the Sherman Act (18 U.S.C.A. § 1). Among post-trial motions filed is a "Motion for Judgment or Acquittal Notwithstanding the Verdict and Renewal of Motion for Judgment of Acquittal and in the Alternative for a New Trial." No useful purpose would be served by extended discussion of the grounds of the motion other than Ground 5, which has to do with the claim that the jury was influenced by newspaper articles published during the trial. The offending news stories have been preserved in the record as Court's Exhibits 1, 2, 3 and 4, and consist of articles appearing, respectively, in The Topeka Daily Capital, The Kansas City Kansan, The Kansas City Star and The Kansas City Times.

Following the practices recommended by the Court of Appeals, Tenth Circuit, in Mares v. United States, 383 F.2d 805 (1967), each juror was separately examined by the court. None had seen Exhibits 1, 2 or 4. Three of the jurors had seen the headlines which captioned the story appearing in the September 28, 1967 edition of The Kansas City Star. Each of the three, heeding the admonition of the court, had desisted from reading the story after being alerted by the headlines that it might have some

peripheral connection with the circumstances involved in the case on trial. The headlines read:

"ATTEMPT MADE
AT OIL ACCORD
Kansas Highway Board
Meets With Counsel
for Firms
NO COMMITMENTS YET
Talks Explore Possibility
of Antitrust Settlement"

The situation thus presented points up a dilemma confronting trial courts and jurors. The usual admonition, in this court at least, is to the effect that the veniremen must not read any news stories reporting on or in any way touching upon any aspect of the case on trial. Unless jurors are sequestered or denied the right to read any newspapers or to watch or listen to any television or radio programs, how may they determine, until headlines are seen or the broadcaster's opening sentence uttered, that what is to follow is something forbidden to them? Sequestration in the ordinary case is expensive to the government and troublesome to the jurors and the marshal. Denial of access to all news media, even if enforceable, would impose undue restrictions on the jurors.

When prejudicial information is conveyed by the headlines themselves, as in Mares, the harm is done even though the juror reads no further. Here, the defendant was charged with conspiring to fix prices in the sale of liquid asphalt to the State of Kansas. The headlines read by Jurors Kidd, Burt, and Choplin contained information that there were negotiations for settlement of a civil suit brought by the State of Kansas and grounded on the same conspiracy as was involved in this case. Specific reference was made to the "possibility of antitrust settlement." Although there was no mention of Wilshire in the headlines, the defend-

ant argues that a juror reading them would assume that the defendant was involved in the settlement efforts and would ask himself "Why, if not guilty, does this company offer to comprise its civil liability?" (Actually, Wilshire was not a party to the reported negotiations).

Juror Kidd assumed that there was some connection between the headlines and the case. Juror Burt, after seeing the words: "Attempt Made at Oil * * *" desisted from reading further "because I knew it was something, evidently, that had to do with this." Juror Choplin saw "the first big headline" and read no more, because she "thought it might pertain to that, so I didn't read it." It is clear, therefore, that the jurors who were exposed to the headlines realized that they referred in some manner to the conspiracy charged against the defendant. It is equally clear that all of them were mindful of the court's admonition and conscientiously observed it.

We do not have here the situations present in Mares and in Marshall v. United States, 360 U.S. 310 (1959). In Mares, the news story and its headlines reported an earlier confession by the defendant of his guilt of the very crime for which he was then on trial. In Marshall, the jurors were exposed to information as to prior offenses, evidence which the trial judge had ruled could not be admitted on the trial. Here, the story and the headlines read by the three jurors reported only that efforts were being made to settle a related civil case. Here, pursuant to pretrial stipulation, the jurors were informed at the commencement of the trial that other corporate defendants in this same case had entered pleas of nolo contendere. There is no reason to believe that the three jurors supposed when they read the headlines that reference was being made to any others than the co-defendants or that Wilshire was in any way involved in the settlement negotiations. Prejudice because of publicity will not be presumed. Welch v. United States, 371 F.2d 291 (10th Cir.) cert. denied, 385 U.S. 957

(1966). As the Supreme Court has said, "the trial judge has a large discretion in ruing on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. * * * (E)ach case must turn on its special facts." Marshall v. United States, supra, at 312.

Under the special facts in this case, I am satisfied that none of the jurors were influenced by the reading of the headlines and that there was no resulting prejudice to the defendant's right to a fair trial.

IT IS ORDERED that the defendant's motion be denied.

Dated at Kansas City, this 29th day of March, 1968.

(Signed) ARTHUR J. STANLEY, JR.
Chief Judge

APPENDIX IV

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

CIVIL ACTION NO. KC-2487 Equitable Relief Sought,

Filed Apr. 5, 1966. Charles W. Cahill, Clerk. By M. J. Wiggans.

UNITED STATES OF AMERICA, Plaintiff,

v.

SOCONY MOBIL OIL COMPANY, INC.; SKELLY OIL COMPANY; THE CONSUMERS COOPERATIVE ASSOCIATION; AMERICAN PETROFINA COMPANY OF TEXAS; UNION ASPHALTS & ROADOILS, INC; THE AMERICAN OIL COMPANY; APCO OIL CORPORATION; and PHILLIPS PETROLEUM COMPANY, Defendants.

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the hereinafter named defendants and complains and alleges as follows:

I

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain violations by the defendants of Section 1 of said Act.

2. Each of the defendants named herein transacts business and is found in the District of Kansas.

II

THE DEFENDANTS

3. Each of the following corporations is made a de-

fendant herein. Each of said corporations is organized and exists under the laws of the State indicated and has its principal place of business in the city indicated. Within the period of time covered by this complaint defendants have engaged in the business of distributing and selling liquid asphalt in the State of Kansas as well as in other States:

Defendant Corporation	State of Incorporation	Principal Place of Business
Socony Mobil Oil Company, Inc.	New York	New York, New York
Skelly Oil Company	Delaware	Tulsa, Oklahoma
The Consumers Co-operative Association	Kansas	Kansas City, Missouri
American Petrofina Company of Texas	Delaware	Dallas, Texas
Union Asphalts & Roadoils, Inc.	Missouri	Kansas City, Missouri
The American Oil Company	Maryland	Chicago, Illinois
Phillips Petroleum Company	Delaware	Bartlesville, Oklahoma

4. Apco Oil Corporation (hereinafter referred to as "Apco", a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Oklahoma City, Oklahoma, is made a defendant herein. On August 30, 1960 Apco entered into an agreement, consummated March 31, 1961, for the purchase of certain assets of Anderson-Prichard Oil Corporation and since about March 31, 1961 Apco has engaged in the business of distributing and selling liquid asphalt in the State of Kansas and in other States. Anderson-Prichard Oil Corporation existed as a Delaware corporation from at least 1959 until it was dissolved on or about October 27, 1961. Prior to the acquisition of certain of its assets by Apco, Anderson-Prichard Oil Corporation

engaged in the business of distributing and selling liquid asphalt in the State of Kansas and in other states.

III

THE CO-CONSPIRATORS

5. Various firms, corporations, and individuals not named as defendants in this complaint participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV

DEFINITIONS

6. Whenever used in this complaint, the term "liquid asphalt" means an asphaltic by-product produced in refining crude oil and includes various types and grades of liquid asphalt, the most common of which are medium curing (M.C.), slow curing (S.C.), and rapid curing (R.C.). Liquid asphalt, sometimes called "bituminous materials," is commonly referred to as "cutbak asphalt" and is used in the maintenance and repair of roads, streets, and highways.

V

NATURE OF TRADE AND COMMERCE

Many States, including the State of Kansas, buy and use substantial quantities of liquid asphalt for the maintenance of certain types of roads and highways which commonly are referred to as "black top" roads. For this purpose the State of Kansas annually uses substantial quantities of liquid asphalt.

8. The State of Kansas annually invites and accepts sealed bids for delivery of liquid asphalt by suppliers thereof via truck transport at delivered prices to designated locations within the State of Kansas. The State of Kansas at annual maintenance lettings awards contracts to the lowest bidders, the contracts providing for the de-

livery of liquid asphalt as needed by the State of Kansas during the year at job sites and locations in Kansas as designated by the State of Kansas.

9. Substantial quantities of liquid asphalt purchased by the State of Kansas are transported into Kansas in a continuous and uninterrupted flow of interstate commerce directly from the refinery of The American Oil Company which is located at Sugar Creek, Missouri, to job sites in Kansas.

10. Substantial quantities of crude oil are transported in a continuous and uninterrupted flow of interstate commerce to refineries located in the State of Kansas to be processed into liquid asphalt which is then sold by suppliers to the State of Kansas.

11. The corporate defendants are among the largest producers, distributors, and suppliers of liquid asphalt in the United States. Facilities for the production or distribution of liquid asphalt are maintained by some of the corporate defendants and co-conspirators in two or more States, including the States of Kansas, Texas, Oklahoma, Illinois and Missouri.

12. During the period from 1959 through 1965, approximaetly 112,000,000 gallons of liquid asphalt valued at approximately $12,000.00 were sold and delivered by defendants and co-conspirators to the State of Kansas pursuant to sealed bids. A substantial part of the aforesaid sales and deliveries of liquid asphalt was sold and shipped in interstate trade and commerce.

VI

OFFENSE CHARGED

13. Beginning some time prior to 1959 and continuing thereafter through at least 1965, the defendants and co-conspirators entered into and engaged in a combination and conspiracy in unreasonable restraint of the here-

inbefore described interstate trade and commerce in liquid asphalt in violation of Section 1 of the Act of Congress of July 2, 1890 (15 U.S.C. § 1), commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been:

(a) To fix, maintain, and establish non-competitive prices for the sale of liquid asphalt to the State of Kansas;

(b) To submit collusive, non-competitive, and rigged bids and price quotations for the sale of liquid asphalt to the State of Kansas;

(c) To allocate among themselves the sale of liquid asphalt to the State of Kansas.

15. In formulating and effecutaing the foregoing unlawful combination and conspiracy, the defendants and co-conspirators have done the things which as hereinbefore alleged they agreed to do, and, among other things they have met in Kansas City, Topeka, Salina, and Wichita, Kansas; and in other cities, and have had conversations at hotels, motels, offices, and other places wherein they:

(a) Designated the low bidders for the sale of liquid asphalt pursuant to sealed bids to the State of Kansas;

(b) Allocated among themselves, by delivery locations, the sale of liquid asphalt pursuant to sealed bids to the State of Kansas;

(c) Discussed and agreed upon f.o.b. prices for the sale of liquid asphalt to the State of Kansas;

(d) Discussed and agreed upon, and distributed among themselves, common freight rates to be used in

bidding to each of the approximately 400 delivery locations in the State of Kansas;

(e) Discussed and agreed that each defendant and co-conspirator would bid below the agreed-upon f.o.b. price and freight rate for sales on which it was to be the low bidder and that each defendant and co-conspirator would bid the agreed-upon f.o.b. price and freight rate or above for sales on which it had agreed not to be the low bidder.

16. During the period of time covered by this complaint and pursuant to the combination and conspiracy hereinabove described, each defendant has prepared and submitted sealed bids for the sale of and has sold liquid asphalt to the State of Kansas.

VII

17. The aforesaid combination and conspiracy has had, among others, the following effects:

(a) Prices of liquid asphalt sold to the State of Kansas have been fixed, maintained, and established at high, artificial, and non-competitive levels;

(b) Competition in the sale and distribution of liquid asphalt to the State of Kansas has been restrained, suppressed, and eliminated;

(c) The submission of rigged, non-competitive bids operated as a fraud and deceit upon the State of Kansas;

(d) The State of Kansas has been denied the right of buying liquid asphalt from suppliers of its own choice.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that the defend-

ants have engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

2. That each defendant named in this complaint, its successors, assigneess, transferees, and the respective officers, directors, agents, and employees thereof, and all persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from continuing, maintaining, or renewing, directly or indirectly, any combination or conspiracy hereinbefore alleged, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program, or device having a similar purpose or effect in the sale of liquid asphalt TO ANY customer in the United States.

3. That each defendant be ordered in submitting a sealed bid to ANY FEDERAL, STATE OR LOCAL GOVERNMENT, authority, agency, or instrumentality for the sale of liquid asphalt, to submit with such bid an affidavit, in a form approved by the Court, certifying that said bid was arrived at non-conclusively.

4. That each defendant be ordered to maintain, for a period of 10 years from the date of entry of a final judgment herein, a record of all meetings, formal or informal, between any of its officers, directors, or employees having authority in connection with the sale of liquid asphalt, and representatives of any other suppliers of liquid asphalt; that said records include the dates and places of said meetings, the names of all persons in attendance, and a listing of the topics discussed; and that said records be made available to plaintiff for inspection within a reasonable time after written demand.

5. That the defendants be required to take such further action as the Court may deem necessary and appropriate to terminate and dissipate the effects of the unlawful activities hereinabove alleged and to permit and

restore competition in interstate trade and commerce in the sale of liquid asphalt.

6. That the plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

7. That the plaintiff recover the costs of this suit.

Dated: 4-5-66

Signatures of counsel omitted.

U.S. District Court, District of Kansas—ss.

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

CHARLES W. CAHILL, Clerk
By B. Ross, Deputy.

(Seal)
Dated: 4/9/70

APPENDIX V

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS
[KANSAS CITY DOCKET]

CIVIL ACTION NO. 2487

Filed June 20, 1969. Charles W. Cahill, Clerk By Betty L. Ross, Deputy.

UNITED STATES OF AMERICA, Plaintiff,

vs.

SOCONY MOBIL OIL COMPANY, INC; SKELLY OIL COMPANY; THE CONSUMERS COOPERATIVE ASSOCIATION; AMERICAN PETROFINA COMPANY OF TEXAS; UNION ASPHALTS & ROADOILS, INC.; THE AMERICAN OIL COMPANY; APCO OIL CORPORATION; and PHILLIPS PETROLEUM COMPANY, Defendants.

STIPULATION

It is stipulated by and between the plaintiff and all defendants, by their respective attorneys, that:

(1) The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without further notice to any part or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of thirty (30) days by serving notice thereof upon the other party hereto and filing said notice with the Court;

(3) Defendant Socony Mobil Oil Company, Inc. has changed its name to Mobil Oil Corporation;

(4) In the event plaintiff withdraws its consent hereto, this Stipulation shall be of no effect whatever in this or any other proceeding and the making of this Stipulation shall not in any manner prejudice any consenting party in any subsequent proceedings.

Signatures of counsel omitted

U.S. District Court, District of Kansas—ss:

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

Charles W. Cahill, Clerk
By B. Ross, Deputy

(Seal)
Dated: 4/9/70

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS
[KANSAS CITY DOCKET]

CIVIL ACTION NO. 2487
Entered: 7-24-69

Filed July 24, 1969. Charles H. Cahill, Clerk. By S. M. Wiggans.

UNITED STATES OF AMERICA, Plaintiff,

v.

SOCONY MOBIL OIL COMPANY, INC.; SKELLY OIL COMPANY; THE CONSUMERS COOPERATIVE ASSOCIATION; AMERICAN PETROFINA COMPANY OF TEXAS; UNION ASPHALTS & ROADOILS, INC.; THE AMERICAN OIL COMPANY; APCO OIL CORPORATION; and PHILLIPS PETROLEUM COMPANY, Defendants.

FINAL JUDGMENT

The plaintiff, United States of America, having filed its Complaint herein on April 5, 1966, and all defendants, by

their attorneys, having consented to the entry of a Final Judgment herein against them without trial or adjudication of any issue of fact or law herein, and without admission by them with respect to any such issue and this Court having determined, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in entering a Final Judgment as to all of plaintiff's claims asserted in said Complaint against these defendants;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the United States of America and the said defendants, the Court hereby determines that the proceeding herein is terminated as to said defendants and directs entry of Final Judgment as to all of plaintiff's claims herein against said defendants and as to said defendants, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The Complaint states claims for relief against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm, corporation, association or other business or legal entity.

(B) "Liquid asphalt" shall mean an asphaltic by-product produced in refining crude oil used in the construction, maintenance and repair of roads, streets and highways, including but not limited to various types and

grades, the most common of which are emulsions, asphaltic cement (AC); medium curing (MC), slow curing (SC), and rapid curing (RC).

(C) The "mid-continent area" shall mean the States of Montana, North Dakota, South Dakota, Wisconsin, Minnesota, Iowa, Nebraska, KANSAS, MISSOURI, Arkansas and Oklahoma.

III

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, and to each of its subsidiaries, successors, and assigns and to each of its directors, officers, agents, and employees, and to all persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

Each defendant is enjoined and restrained from, directly or indirectly, entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program with any other manufacturer, distributor or seller of liquid asphalt to:

(A) Fix, establish maintain or adhere to prices, discounts or other terms or conditions for the sale of liquid asphalt to any third person;

(B) Submit collusive or rigged bids or price quotations for the sale of liquid asphalt to any third person;

(C) Allocate or divide markets or territories for the distribution or sale of liquid asphalt to any third person;

(D) Furnish or receive information concerning prices, discounts, or other terms or conditions of sale at or upon which any liquid asphalt is to be offered for sale to any third person.

V

Each defendant is enjoined and restrained from, directly or indirectly:

(A) Communicating to any manufacturer, distributor, or seller of liquid asphalt any price, discount or other term or condition of sale of liquid asphalt to any third person prior to the communication of such price, discount, term or condition to the public or trade generally;

(B) Disclosing to any manufacturer, distributor or seller of liquid asphalt, prior to the public opening of a sealed bid or sealed quotation, the intention to submit or not submit a bid or a quotation, the fact that a bid or a quotation has or has not been submitted or made, or the content or terms of any bid or quotation for the sale of any liquid asphalt to any third person, except information which is disclosed or exchanged in order to submit a joint bid or quotation which has been requested in writing by the buyer or which bid is known by the buyer to be a joint bid.

(C) Joining, participating in or belonging to any trade association, organization, or industry group with knowledge that any of the activities thereof are contrary to or inconsistent with any of the provisions of this Final Judgment.

VI

For a period of five (5) years following the date of entry of this Final Judgment, each defendant is ordered and directed to furnish, simultaneously with each sealed bid and each sealed quotation for the sale of liquid asphalt submitted by it to ANY FEDERAL, STATE, OR LOCAL AGENCIES OR ANY OTHER GOVERNMENTAL AWARDING AUTHORITIES IN THE MID-CONTINENT AREA of the United States, an affidavit by the official of

such defendant having authority to determine the price or prices bid or quoted that said bid or quotation was not the result of any agreement, understanding, plan or program between such defendant and any other manufacturer, distributor, or seller of liquid asphalt not named party to such sealed bid.

VII

For the purpose of securing or determining compliance with this Final Judgment, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted:

(A) Access, during the office hours of such defendant, who may have counsel present, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any of the matters contained in this Final Judgment;

(B) To interview officers or employees of such defendant, who may have counsel present, subject to the reasonable convenience of such defendant and without interference or restraint from it, regarding any such matters; and upon such request defendant shall submit such reports in writing, under oath if so requested, to the Department of Justice with respect to any of the matters contained in this Final Judgment as may from time to time be requested.

No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings in which the United States is a party for the pur-

pose of securing or determining compliance with this Final Judgment or as otherwise required by law.

VIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or for the modification or termination of any of the provisions hereof, and for the enforcement of compliance therewith and punishment of violations thereof.

(Signed) Arthur J. Stanley, Jr.

United States District Judge

Dated: July 24, 1969.

U. S. District Court, District of Kansas—ss:

(Seal)

Charles W. Cahill, Clerk
By B. Ross, Deputy

Dated: 4/9/70

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 397

WILSHIRE OIL COMPANY OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A14) is not yet reported. The memorandum opinion of the district court (Pet. App. A17–A20) is not reported. The unreported opinion of the district court rejecting petitioner's double jeopardy claim is printed in the appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1970, and a petition for rehearing was denied on June 16, 1970. The petition for a writ of certiorari was filed on July 15, 1970. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Double Jeopardy Clause of the Fifth Amendment, petitioner's prior conviction for conspiring to fix prices on sales to the State of Missouri barred its prosecution for conspiring to fix prices on sales of the same commodity to the State of Kansas.

2. Whether the indictment sufficiently charged and the evidence proved that petitioner knowingly became a party to the conspiracy.

3. Whether the indictment charged and the proof showed a restraint upon interstate commerce.

4. Whether petitioner was prejudiced by the fact that three jurors had read a newspaper headline relating to the case.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

Section 1 of the Sherman Act, 15 U.S.C. 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of the title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of combining and conspiring to fix prices through bid rigging on the sale of liquid asphalt to the State of Kansas, in violation of Section 1 of the Sherman Act, and was fined $25,000 (Pet. App. A2). Petitioner was one of ten corporations indicted; the other nine pleaded *nolo contendere* and were fined from $25,000 to $40,000 each (*ibid.*). The indictment alleged that the conspiracy continued from 1959 to 1965, but that petitioner's participation was between December 31, 1960, and August 9, 1963 (Pet. App. A4).

Approximately nine months before the return of this indictment, petitioner and thirty-four other corporations and individuals had been indicted by a grand jury in the Eastern District of Missouri for engaging in similar conduct in selling liquid asphalt to the State of Missouri (Pet. App. A9). All the defendants in the Missouri case, including petitioner, pleaded *nolo contendere* and were fined (Pet. 7).

Petitioner moved to dismiss the Kansas indictment on the ground, among others, that its prior conviction under the Missouri indictment barred the present prosecution under the Double Jeopardy Clause of the Fifth Amendment (Pet. 5). The district court denied the motion at a pre-trial hearing (Pet. 5); petitioner renewed the motion after conviction, and the district court denied it with an opinion (App. *infra*, pp. 13–15).